Nos. 14-1418, 14-1453, 14-1505,
15-35, 15-105, 15-119 & 15-191

In The

Supreme Court of the United States

DAVID A. ZUBIK, et al.,

Petitioners,

v.

SYLVIA BURWELL, Secretary of
Health and Human Services, et al.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third, Fifth, Tenth And District Of Columbia Circuits

BRIEF OF *AMICI CURIAE* HARVARD LAW SCHOOL CENTER FOR HEALTH LAW AND POLICY INNOVATION, ET AL. IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. Participation in the Provision of No Cost Preventive Services, Via Accommodation or Otherwise, Does Not Violate RFRA	4
A. The Accommodation Does Not Place a Substantial Burden on the Petitioners' Exercise of Religion	4
B. The Government Has a Compelling Interest in Standardizing Access to Preventive Care	6
II. Improving the Quality of Preventive Care Coverage for all Americans is a Compelling Government Interest	8
A. Preventive Services are a Critical Component of Improving Health Care	9
1. Historically Rates of Preventive Care in the United States Have Been Low	9
2. Contraceptive Services are Preventive Care	11
3. Coordination and Uniformity in Public Health and Preventive Care Traditionally Has Been a Compelling Government Interest	13

TABLE OF CONTENTS – Continued

Page

4. Promoting Uniform Access to Preventive Care is a Key Component of the Affordable Care Act 15

B. Allowing Employers to Use RFRA to "Edit" Their Employees' Health Care Coverage Would Undermine the Ability of Americans to Obtain Meaningful Access to Care 16

1. Preventive Care Addresses Other Health Conditions That Are Sometimes Controversial 17

2. The Government Must Have Some Way of Insuring that Consumers Have Access to Necessary Care 19

III. Because Meaningful Access to Preventive Care is a Compelling Government Interest the Judgments of the Lower Courts Should be Upheld 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 7

Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal, 536 U.S. 418 (2006) 7

Grutter v. Bollinger, 539 U.S. 306 (2003) 7

Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905) 14

Sherbert v. Verner, 374 U.S. 398 (1963) 6

United States v. Lee, 455 U.S. 252 (1982) 5

Wisconsin v. Yoder, 406 U.S. 205 (1972) 6

STATUTES

Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq*. ..... *passim*

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TABLE OF AUTHORITIES – Continued

Page

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Emily Peterson, et al., *Interim Guidelines for Pregnant Women During a Zika Virus Outbreak – United States, 2016*, 65 MORBIDITY AND MORTALITY WKLY. REP., 30 (2016).....11

Howard Koh and Kathleen Sebelius, *Prevention Through the Affordable Care Act*, 363 NEW ENG. J. OF MED., 1296 (2010) 15

Institute of Medicine, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (2011).....17

Jared Fox and Frederic Shaw, *Clinical Preventive Services Coverage and the Affordable Care Act*, 105 AM. J. OF PUB. HEALTH, e7 (2015).....10

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Jessica Smith and Carla Medalia, *Health Insurance Coverage in the United States: 2014*, U.S. Census Bureau U.S. Government Printing Office (2015).....7

TABLE OF AUTHORITIES – Continued

Page

Kelly Cleveland et al., *Family Planning as a Cost-Saving Preventive Health Service*, 364 NEW ENG. J. OF MED., e37 (2011) 11

Michael Chernew, *Impact of Decreasing Co-payments on Medication Adherence Within a Disease Management Environment*, 27 HEALTH AFF., 103 (2008) 10

Peter J. Cunningham, *NIHCR Research Brief No.* 12 (2009) 9

R. Stall et al., *Decisions to get HIV Tested and to Accept Antiretroviral Therapies Among Gay/Bisexual Men: Implications for Secondary Prevention Efforts*, 11 J. OF ACQUIRED IMMUNE DEFICIENCY SYNDROMES AND HUM. RETROVIROLOGY, 151 (1996) 17

Reza Rezayatmand et al., *The Impact of Out-of-Pocket Payments on Prevention and Health-Related Lifestyle: A Systematic Literature Review*, 23 EUR. J. OF PUB. HEALTH, 74 (2013) 10

Stephen Kent and Terra Manca, *A War Over Mental Health Professionalism: Scientology Versus Psychiatry*, 17 MENTAL HEALTH, RELIGION & CULTURE, 1 (2012) 18

Udani Samarasekera and Marcia Triunfol, *Concern Over Zika Virus Grips the World*, THE LANCET (2016) 12

TABLE OF AUTHORITIES – Continued

Page

Xuesong Han, *Has Recommended Preventive Service Use Increased After Elimination of Cost-Sharing as a Part of the Affordable Care Act in the United States?* 78 PREVENTIVE MED., 85 (2015).....16

INTEREST OF *AMICI CURIAE*[1]

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The Harvard Law School Center for Health Law and Policy Innovation advocates for legal, regulatory, and policy reforms to improve the health of underserved populations, with a focus on the needs of

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[1] *Amici* submit this brief pursuant to Supreme Court Rule 37.4. Both parties have consented to the filing of *amicus curiae* briefs in support of either party. Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amici*, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

low-income people living with chronic illnesses and disabilities. All *Amici* are involved with the provision of health care and services to chronic disease communities, including the HIV and Hepatitis C communities. As such, *Amici* are uniquely placed to note the importance of the standardized package of preventive services to the populations that have most benefitted from the Affordable Care Act's changes to the United States health care system.

Amici write to place the importance of the mandated preventive care package established by the Affordable Care Act (ACA) in the broader context of newly established access to health care for vulnerable populations. *Amici* also write to emphasize the Government's compelling interest in preserving access to the full set of no cost preventive services mandated by the ACA and provided at no cost to those who most need them.

SUMMARY OF ARGUMENT

The central issue in this case is whether a regulatory accommodation for certain religious non-profits to the requirement that employer-based health insurance cover contraception services violates the Religious Freedom Restoration Act of 1993 (RFRA). 42 U.S.C. § 2000bb *et seq.*

Amici agree with the Respondents that the accommodation offered to Petitioners does not substantially burden their exercise of religion. Alternatively,

Amici contend that the Government has a compelling interest to provide preventive services at no cost, including contraceptive services, through the private insurance system. Because of the importance of the services provided at no cost, the Government also has a compelling interest to ensure that all employers offer a standardized mandated package of no cost preventive services to their employees through their health insurance. *Amici*, representing the health care access, HIV, and Hepatitis C (HCV) advocacy communities, note that allowing employers to "edit" the mandated package of preventive services on the basis of religious objections would potentially undermine the provision of important screenings, such as those for HIV or depression. Because the mandatory package of preventive services offers screenings for health conditions adjudged controversial by some religious groups – such as HIV due to the stigma around homosexuality – *Amici* are concerned that protecting an employer's right to avoid providing controversial services would effectively undermine the purpose of the mandatory package of preventive services.

Amici believe that the simple notification required by employers seeking to avoid funding contraceptive services through their health plans is the least restrictive means of protecting the Government's compelling interest in the uniform provision of preventive services. *Amici* also note that alternate systems proposed by the Petitioners, such as a "carve out" for contraceptive services or allowing employers to withhold communication of their refusal to the

Government, would quickly be unworkable if employers began to object to more than contraceptive services.

ARGUMENT

I. Participation in the Provision of No Cost Preventive Services, Via Accommodation or Otherwise, Does Not Violate RFRA

Amici believe that the Government's accommodation does not violate RFRA because the Petitioners' religious exercise is not substantially burdened. In the alternative, *Amici* believe that the Government has demonstrated a compelling interest in promoting uniform access to preventive care and that the accommodation is the least restrictive means of achieving that interest.

A. The Accommodation Does Not Place a Substantial Burden on the Petitioners' Exercise of Religion

RFRA prohibits the federal Government from "substantially burden[ing] a person's exercise of religion. . . ." 42 U.S.C. § 2000bb-1(a), (b). In this case, the mandatory package of preventive services does not substantially burden the Petitioners' exercise of religion because, as this Court noted, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are

not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982). In this case, the Petitioners have chosen to employ individuals, who may or may not share their religious opinions, and to offer employee benefits, including a health insurance plan, to these individuals.

Furthermore, Petitioners are not providing contraceptive services themselves. Their employees may choose to avail themselves of these services if they do not share their employer's religious beliefs, or they may refrain from using these services if they do. The role of the employer here – facilitating access to contraceptive services but not directly providing them – is so attenuated as to undermine Petitioner's burdensomeness argument. Similarly, an employer may not forbid an employee from using her salary to pay for contraceptive services. By paying a salary, an employer facilitates access to contraceptive services because the employee is provided with funds she may not otherwise have had to pay for these services. Nevertheless, the true "but for" actor is the employee herself, choosing to act according to her own religious principles and health needs. Because the Petitioners are at best minor actors in the decision made by each employee regarding her reproductive health and choices, their exercise of religion is not substantially burdened by their required involvement.

B. The Government Has a Compelling Interest in Standardizing Access to Preventive Care

Although *Amici* do not believe that the accommodation offered to the Petitioners violates RFRA, we also note that the Government has a compelling interest in standardizing access to preventive care by compelling Petitioners to comply with the mandated package of no cost preventive services. Once a Government action is demonstrated to substantially burden religious exercise, that action must be demonstrated to be the least restrictive means of furthering compelling Government interests in order to survive a RFRA challenge. 42 U.S.C. § 2000bb-1. RFRA's compelling interest test stems directly from the balancing test employed in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963). In each of these cases, as well as the RFRA jurisprudence developed over the last few decades, courts must closely evaluate the Government's goals and the extent to which religious exemptions will undermine them. If the exemption will significantly hamper a compelling interest of the Government, then an accommodation for that religious exemption is not mandated under RFRA.

RFRA's compelling interest test must be tailored to take into account the specifics of the contested religious infringement. RFRA requires a focused inquiry in which the Government "demonstrate[s] that the compelling interest test is satisfied through application of the challenged law 'to the person' – the

particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 536 U.S. 418, 430 (2006) (quoting 42 U.S.C. § 2000bb-1). In applications of the compelling interest test outside of the context of RFRA and the Free Exercise clause, this Court has emphasized that "context matters," *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003), and that "strict scrutiny *does* take 'relevant differences' into account. . . ." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995). Nevertheless, this Court recognizes that "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA." *O Centro*, 546 U.S. at 436. As discussed below, the ACA represents a Congressional choice to mandate uniform access to certain health services in order to promote public health. The Government has a strong interest in providing uniform, comprehensive access to a standardized set of preventive services in order to improve public health, move our health care system from an intensive intervention model to a preventive, early intervention model, and to reduce health care costs. Because 55.4% of Americans receive their health care through employer provided insurance, it is important to make sure that these individuals can access comprehensive no cost preventive care through the private insurance system. Jessica Smith and Carla Medalia, *Health Insurance Coverage in the United States: 2014*, U.S. Census Bureau U.S. Government Printing Office (2015).

II. Improving the Quality of Preventive Care Coverage for all Americans is a Compelling Government Interest

Preventive care is a critical component of the health care system that until recently did not receive the focus and support it warrants. Additionally, as a component of public health, preventive care works best when there are high levels of uniform access to these services. The ACA's mandatory package of preventive care services was designed to address that oversight in the American health care system by improving the availability of these services and reducing any cost barriers to individuals.

The Government's interest in improving the health of Americans while reducing the cost of care is substantial. Furthermore, because the majority of individuals in the United States receive their health care through the private insurance system, the Government has a compelling interest in making preventive services available through this financing system, including through employer sponsored health care plans. As a result and because many of these services are important but can be religiously controversial, the Government has an interest in minimizing religious exceptions and requiring some sort of mechanism to track the exemptions it does allow.

A. Preventive Services are a Critical Component of Improving Health Care

Preventive care is more than contraceptive services. Preventive care includes screenings for infectious diseases, such as HIV and HCV, in order to link individuals with earlier treatment and to limit the spread of these conditions. Preventive care allows for earlier, less costly medical interventions, which leads to better health and economic outcomes, increased productivity, and reduced health care spending.

The disease burden and increased cost of treating individuals after disease progression are two pressing Government concerns. Because individuals often do not remain with the same insurer for very long, insurers are not incentivized to provide no cost preventive care services. For example, in 2010 one out of eight nonelderly Americans with employer based health care coverage switched health plans. Peter J. Cunningham, *NIHCR Research Brief No.* 12 (2009), http://www.nihcr.org/Health-Plan-Switching. By contrast, the Government, through its public health agencies and health care initiatives, is well positioned to prioritize these types of interventions.

1. Historically Rates of Preventive Care in the United States Have Been Low

Prior to the ACA, many Americans did not receive necessary preventive services. In 2003, Americans received only 54.9% of recommended preventive services. Elizabeth McGlynn et al., *The Quality of*

Health Care Delivered to Adults in the United States, 348 NEW ENG. J. OF MED., 2635 (2003). Patients were screened for indicated conditions only in 52.2% of the cases where it was medically indicated. *Id.* at 2642. This includes being tested for HIV when engaging in high risk behaviors that increase the risk of infection. *Id.* at 2639.

Beyond just an individual health problem, this is a public health problem. For most conditions, the earlier detection occurs the easier and cheaper the cure, treatment or management is. Before the ACA, it was estimated that approximately 100,000 deaths per year could be prevented if Americans received recommended preventive care. Jared Fox and Frederic Shaw, *Clinical Preventive Services Coverage and the Affordable Care Act*, AM. J. OF PUB. HEALTH 105, e7 (2015). For infectious diseases, knowing one's status is incredibly important, so that appropriate choices can be made to minimize new infections. Low rates of preventive care are a public health and health care financing issue because compliance with preventive services recommendations reduces costs for health care overall. Michael Chernew, *Impact of Decreasing Copayments on Medication Adherence Within a Disease Management Environment*, 27 HEALTH AFF., 103 (2008).

The low rates of preventive care before the ACA can be ascribed, in part, to financial barriers such as high cost sharing. Cost sharing, as a financial barrier, decreases both medication adherence and use of preventive services. Reza Rezayatmand et al., *The*

Impact of Out-of-Pocket Payments on Prevention and Health-Related Lifestyle: A Systematic Literature Review, 23 EUR. J. OF PUB. HEALTH, 74 (2013). Eliminating cost sharing for enrollees spikes utilization of preventive care in private plans, such as employer sponsored health insurance. Daniella Meeker, et al., *Coverage and Preventive Spending*, 46 HEALTH AFF., 173 (2011).

2. Contraceptive Services are Preventive Care

The ACA correctly includes contraceptive services as an important component of preventive care. Contraceptive services recommended by the Institute of Medicine and adopted by HRSA are included in the mandated package of no cost preventive care services.

Access to no cost contraceptive care is a critical component of preventive care. Nearly half the pregnancies that occur each year in the United States are unintended. Kelly Cleveland et al., *Family Planning as a Cost-Saving Preventive Health Service*, 364 NEW ENG. J. OF MED., e37 (2011). Preventing unwanted pregnancies can save lives, since women can avoid complications associated with pregnancy and birth. *Id.* Proper access to reliable contraceptive services goes beyond individual choices to impact the management of public health epidemics. For example, Zika virus is currently known to cause microcephaly, a neurodevelopmental disorder associated with poor brain function and lowered life expectancy. Emily

Peterson, et al., *Interim Guidelines for Pregnant Women During a Zika Virus Outbreak – United States, 2016*, 65 MORBIDITY AND MORTALITY WKLY. REP., 30 (2016). Because there is no vaccine against the virus or treatment to mitigate its effects in fetuses, several countries, including Colombia, Jamaica, El Salvador, and Panama, have advised women to postpone pregnancy for six months to two years. Udani Samarasekera and Marcia Triunfol, *Concern Over Zika Virus Grips the World*, THE LANCET (2016). Without reliable access to no or low cost contraceptive services, there is no way to manage fertility in response to a viral epidemic that can impact pregnant women and fetal development.

Contraceptive care is also extremely cost effective. For example, the cost of one Medicaid-covered birth in the United States was $12,613 whereas the national per-client cost for contraceptive care in the same year was $257. Cleveland et al. at e37. Unfortunately, cost of contraceptive care can be a significant barrier to access. In a nationally representative study, women of reproductive age reported that they would choose to switch from condoms to a contraceptive method with lower failure rates if the costs of the more reliable methods were lower. Jennifer Frost and Jacqueline Darroch, *Factors Associated with Contraceptive Choice and Inconsistent Method Use, United States, 2004*, 40 PERSPS. ON SEXUAL AND REPROD. HEALTH, 94 (2008). When Texas excluded Planned Parenthood affiliates from the state-funded program in 2013, thus reducing access to no or low cost

contraceptive services for low income Texan women, Medicaid covered childbirths increased by 1.9% in the immediate two years after the exclusion. Amanda Stevenson et al., *Effect of Removal of Planned Parenthood from the Texas Women's Health Program*, NEW ENG. J. OF MED. (2016) http://www.nejm.org/doi/pdf/10.1056/NEJMsa1511902. Having no cost access to contraceptive services can help women relying on the private insurance system avoid the financial and health ramifications of unplanned pregnancies. It may also help our health system react appropriately should there be a public health reason, such as Zika virus or an environmental pollutant, to delay childbearing.

3. Coordination and Uniformity in Public Health and Preventive Care Traditionally Has Been a Compelling Government Interest

In *Amici*'s experience as health care access advocates, the lack of accessible preventive care is typically an issue of coordination. Because most individuals switch private health plans every few years, insurers are not incentivized to provide a no cost comprehensive package of preventive services. If an individual insurer began offering comprehensive no cost preventive care, including contraceptive care, it would bear the cost of improving the health outcomes of enrollees who would likely transfer to other plans over the next several years. If all insurers chose at the same time to offer the same package of preventive care, however,

each would benefit. Insurers often note that regulations mandating a package of no cost preventive care would solve this coordination issue.

Coordination of public health initiatives has often been a significant Governmental interest. For example, this Court in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), recognized that the state has an interest in uniformly mandating vaccines, despite individual objections. Asked to balance the rights of the state to protect the public health of the community against the rights of an individual to bodily autonomy, this Court noted:

> There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human Government – especially of any free Government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Jacobson, 197 U.S. at 29. Although *Jacobson* is not a religious freedom or RFRA case, it emphasizes that coordination in public health initiatives is an important Government interest that can outweigh individual objection.

4. Promoting Uniform Access to Preventive Care is a Key Component of the Affordable Care Act

The ACA was designed to address the public health crisis resulting from low levels of preventive services in part by coordinating the removal of cost barriers to preventive services across insurers and across the public and private payer systems. Howard Koh and Kathleen Sebelius, *Prevention Through the Affordable Care Act*, 363 NEW ENG. J. OF MED., 1296 (2010). To remove cost barriers, private health plans and insurance policies are required to cover a range of preventive services at no cost to their enrollees. These no cost services include those rated as "A" or "B" by the U.S. Preventive Services Task Force and services designed by the U.S. Health Resources and Services Administration (HRSA). The Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2010). Preventive services not only cover contraception but also include screening for HIV and Hepatitis C, immunizations, alcohol-misuse counseling, and screenings for breast, cervical, and colorectal cancer. Medicaid and Medicare programs also cover a similar package of services to improve uniformity between the public and private health insurance systems.

Rates of preventive care in the United States have improved since the implementation of mandatory no cost coverage of preventive services. In the privately insured population – including those covered under employer-based health insurance – rates of blood pressure checks, cholesterol checks, and

flu vaccinations increased significantly since 2010. Xuesong Han, *Has Recommended Preventive Service Use Increased After Elimination of Cost-Sharing as a Part of the Affordable Care Act in the United States?* 78 PREVENTIVE MED., 85 (2015). *Amici* in their work as health care access advocates have noticed an increase in testing, screening, and other routine preventive services. The HIV and HCV communities, mindful of the importance of knowing one's status on lowering the rates of transmission, especially applaud the inclusion of HIV and HCV screening in the mandated package of preventive care as an effective intervention to reduce the burden of these epidemics.

B. Allowing Employers to Use RFRA to "Edit" Their Employees' Health Care Coverage Would Undermine the Ability of Americans to Obtain Meaningful Access to Care

While the only accommodation currently offered to employers with religious objections to the ACA relates to contraceptive services, other mandated preventive services could be impacted by the Court's ruling in this case. The Government has an interest in maintaining control of the total package of no cost preventive care, instead of letting it be a patchwork depending on the religious beliefs of employers.

1. Preventive Care Addresses Other Health Conditions That Are Sometimes Controversial

The mandated package of preventive services includes more than contraceptive services. As noted above, this package also includes screening for certain infectious diseases, such as HIV and HCV, and other conditions such as depression. These conditions, although often manageable or curable through appropriate treatment, frequently conflict with a variety of religious beliefs.

HIV has long been identified with homosexual activity. As noted in an overview of lesbian, gay, bisexual, and transgender (LGBT) health issues by the Institute of Medicine, the stigma associated with being LGBT negatively affects the health status of many Americans. *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (2011) https://iom.nationalacademies.org/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx. This stigma is a contributing factor to a widespread reluctance among the public to get tested for HIV. R. Stall et al., *Decisions to get HIV Tested and to Accept Antiretroviral Therapies Among Gay/Bisexual Men: Implications for Secondary Prevention Efforts*, 11 J. OF ACQUIRED IMMUNE DEFICIENCY SYNDROMES AND HUM. RETROVIROLOGY, 151 (1996). Almost one in five individuals living with HIV do not know that they are infected. Centers for Disease Control and Prevention, "*HIV Surveillance Supplemental Report 2012*" (2012)

http://www.cdc.gov/hiv/surveillance/resources/reports/2010supp_vol17no3/index.htm.

Other conditions screened for by services offered in the mandatory package of preventive care are also associated with religious disapproval from a variety of religions and creeds. HCV, similar to HIV, is identified with stigmatized behavior, including intravenous drug use and sexual activity, that is disapproved by a variety of religious organizations. Depression is often treated with anti-depressants and other psychiatric drugs. Certain religions such as Scientology, however, consider these treatments anathema. Stephen Kent and Terra Manca, *A War Over Mental Health Professionalism: Scientology Versus Psychiatry*, 17 MENTAL HEALTH, RELIGION & CULTURE, 1 (2012). Jehovah's Witnesses, Christian Scientists, and some Churches who believe in faith healing have sincere religious objections to vaccinations, including flu vaccinations. Employers who believe in faith healing over medical treatment may decline to cover treatment obtained from a physician and not a faith healer.

Amici are concerned that religious employers will continue to "edit" the mandated package of preventive services, and chip away at other coverage of these conditions, by invoking RFRA. *Amici* have already received reports of employers using religious objections to avoid covering HIV medications on the health plans they offer their employees. Allowing employers to claim that facilitating meaningful access to health care substantially burdens their exercise of religion renders the total health of their employees,

not just their reproductive health and choices, vulnerable.

2. The Government Must Have Some Way of Insuring that Consumers Have Access to Necessary Care

The potential for employers to object to more than contraceptive care under RFRA also raises concerns about the Government's ability to accommodate these religious objections. Currently, the Government provides an accommodation for non-profit and closely held employers who have religious objections to contraceptive use. This accommodation – sending notice to the Government of the decision to omit contraceptive services – is a minor burden on employers.

Nevertheless, this accommodation is the necessary and least restrictive means for achieving uniform access to preventive care services, including contraceptive services. The Government must have some way to record which employers are declining to facilitate access to contraceptive services. Similarly, should employers object to other preventive services, such as HIV and HCV screenings, the Government would need some way to keep track of these denials of coverage. Allowing employers to unilaterally "edit" the mandated package of preventive services without any sort of notification to the Government would quickly create a patchwork of preventive service availability, undermining the progress made by the ACA's preventive care initiative.

III. Because Meaningful Access to Preventive Care is a Compelling Government Interest the Judgments of the Lower Courts Should be Upheld

Amici agree with Respondents that requiring employers to provide notification is not a substantial burden on the employers' exercise of religion.

Contraceptive care, as mandated by the ACA, is preventive care. Preventive care is a critical part of a functional public health and health care financing regime. The Government has a compelling interest in improving public health as well as containing health care costs. Allowing employers to "edit" the mandated package of preventive care will undermine more than access to contraceptive care. It will potentially undercut access to screening for infectious diseases, mental health, and other conditions that may also raise religious objections due to the beliefs related to or the stigma associated with these conditions. For such reasons, the Government has a compelling interest in ensuring that employers cannot prevent their employees from obtaining preventive care at low or no cost. As such, Petitioners' contention that RFRA allows them to avoid any participation in the provision of the mandated package of preventive care, including contraceptive services, should fail.

CONCLUSION

The Court should uphold the judgments of the Courts of Appeals.

Respectfully submitted,

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